No. 83-5053

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

SALVATORE PETRELLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner may challenge the validity of a deportation order as a defense to a prosecution for unlawfully reentering the country.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A3807-A3813) is reported at 707 F.2d 64.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1983. The petition for a writ of certiorari was filed on July 14, 1983, and is accordingly out-of-time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Vermont, petitioner was convicted of illegally reentering the United States after deportation, in violation of 8 U.S.C. 1326. He was sentenced to one year of imprisonment, all but 30 days of which was suspended, and was placed on probation for a period of two years to commence after his release from confinement. The court of appeals affirmed (Pet. App. A3807-A3813).

1. The essential facts are related in the opinion of the court of appeals (Pet. App. A3808-A3809). Petitioner was admitted to the United States in 1978 as a visitor to inspect and study a training program for machine tool operators in Billerica, Massachusetts. After he decided to enroll in the program, the Immigration and Naturalization Service (INS) granted him a one-year trainee visa. When the visa expired, petitioner failed to depart voluntarily and a deportation warrant issued. With the aid of retained counsel, who represented him before the INS, petitioner delayed his departure from the United States for an additional three years. Finally, the Board of Immigration Appeals issued a deportation order, from which petitioner did not appeal. On April 19, 1982, petitioner was arrested and deported to Italy.

Approximately a month later, petitioner flew from Italy to Canada and unsuccessfully attempted to enter the United States at Niagara Falls. On May 23, 1982, he again attempted to cross the border at Highgate Springs, Vermont. In response to routine questions by immigration inspectors, petitioner stated that he was a United States citizen and produced a social security card and a Massachusetts drivers' license to support his claim. A search of his automobile yielded an Italian passport. After further questioning, petitioner was arrested.

2. Prior to trial, petitioner moved to dismiss the indictment on the ground that he was denied due process at his deportation proceeding. The district court refused to review the merits of the deportation order and denied the motion.

On appeal, petitioner again attacked the validity of his original deportation order as a defense to his prosecution under 8 U.S.C. 1326. The court of appeals, like the district court, rejected petitioner's submission. The court of appeals noted that a conviction under 8 U.S.C. 1326 does not depend upon the underlying validity of the prior deportation; "the statute seeks to punish the unauthorized reentry of an alien previously

deported, regardless of whether the deportation was 'lawful'" (Pet. App. A3811).

The court also noted that petitioner's asserted right to collateral review of his prior deportation was contrary to "the relevant provisions of the [Immigration and Naturalization Act] relating to judicial review of deportation orders" (Pet. App. A3812). Under the Act, there are three "sole and exclusive" (8 U.S.C. 1105a(a)) avenues for judicial review of an administrative deportation order. First, an alien may obtain judicial review of the rulings of the Board of Immigration Appeals in the federal courts of appeals if he petitions for review within six months of the deportation order. 8 U.S.C. 1105a(a). Second, if the alien is in custody pursuant to the deportation order, he may seek habeas corpus review. 8 U.S.C. 1105a(a)(9). Finally, an alien may obtain pretrial judicial review of a deportation order in a criminal prosecution for failing to depart (8 U.S.C. 1252(d)) or for violating supervisory regulations (8 U.S.C. 1252(e)). 8 U.S.C. 1105a(a)(6). Because "neither [8 U.S.C. 1326] on its face nor the statutory scheme for review of deportation orders authorizes a challenge to the original deportation," the court concluded "that Congress intended to bar collateral attacks in §1326 prosecutions" (Pet. App. A3812).

ARGUMENT

Petitioner contends that the courts below erred in refusing to allow him to challenge the validity of his original order of deportation as a defense to his prosecution for unlawfully reentering the country after he was deported. Petitioner's claim is without merit.

Section 1326 provides in pertinent part that "[a]ny alien who - (1) has been arrested and deported or excluded and deported, and thereafter (2) enters, attempts to enter, or is at any time found in, the United States * * * shall be guilty of a felony * * *." Because no modifier restricts the scope of the

term "deported," nothing on the face of the statute suggests a congressional intent to limit its coverage to persons whose deportation was lawful. Rather, the plain meaning of this sweeping statutory language is that unauthorized reentry following deportation is unlawful, regardless of the legal validity of the deportation.

This Court's reasoning in Lewis v. United States, 445 U.S. 55 (1980), is highly relevant to the proper construction of 8 U.S.C. 1326. In Lewis the issue was whether a previously convicted felon may challenge the constitutionality of his prior conviction as a defense to a prosecution under 18 U.S.C. 1202(a)(1), which bars firearms possession by any person who "has been convicted by a court of the United States or of a State * * * of a felony." The Court concluded that the underlying validity of the prior conviction was irrelevant to a prosecution under 18 U.S.C. 1202(a)(1). In the absence of any modifier limiting the scope of the word "convicted," the Court refused to read into the statute any requirement that the conviction be lawfully obtained (445 U.S. at 60). Likewise, a prosecution under 8 U.S.C. 1326 does not hinge upon the prior deportation order's soundness.

The plain language of 8 U.S.C. 1326, moreover, is not the sole support for the court of appeals' decision in this case. Congress' careful enumeration in 8 U.S.C. 1105a of the "sole and exclusive" avenues for judicial review of administrative deportation orders also refutes petitioner's claim. Nothing in that section remotely suggests that the original order of deportation may be challenged in a prosecution under Section 1326. To the contrary, Section 1105(a)(C) expressly provides that an order of deportation may not be reviewed by any court where the alien has left the country after the issuance of the order. Congress' intent to bar collateral attack on deportation orders in Section 1326 prosecutions is further evidenced by the fact that Section 1105(a)(6) expressly permits collateral attack

of deportation orders in prosecutions for failing to depart the country (8 U.S.C. 1252(d)) and for violating supervisory regulations (8 U.S.C. 1253(e)). Had Congress intended to authorize collateral attack of deportation orders in Section 1326 prosecutions it would certainly have said so.

Petitioner, however, does not really argue that Congress intended to permit collateral attacks of deportation orders in prosecutions under Section 1326. Rather, it appears to be petitioner's primary submission that he has a constitutional right to such collateral review. But this argument too is refuted by Lewis v. United States, supra. After holding that Congress, by means of 18 U.S.C. 1202(a)(1), intended to prohibit a felon from possessing a firearm despite the fact that the predicate felony conviction may have been unconstitutionally obtained, the court went on to rule that Congress could, consistent with due process, "focus not on reliability, but on the mere fact of conviction * * * in order to keep firearms away from potentially dangerous persons" (445 U.S. at 67). Likewise, in the present context, Congress may constitutionally bar previously deported aliens from reentering the country without permission, regardless of possible objections that may be raised as to the original deportation. Under a contrary rule, any alien who erroneously believed that his deportation was improper would be encouraged to reenter the country without authorization, and effective enforcement of the immigration laws would be seriously impeded. Cf. United States v. Pereira, 574 F.2d 103, 105 n.4, 106 n.6 (2d Cir.), cert. denied, 439 U.S. 847 (1978) (defendant may not contest the propriety of a prior deportation order in a prosecution under 8 U.S.C. 1326 where defendant had continuously and flagrantly disregarded the immigration laws).

Petitioner attempts to distinguish Lewis on the ground that the predicate event in that case was a criminal conviction rather than an administrative order of deportation. He asserts that this factual distinction is dispositive because "important rights

in criminal proceedings * * * do not obtain in deportation proceedings" (Pet. 6). If the reliability of the deportation determination were at issue under Section 1326, petitioner's argument conceivably might have merit. But, as we have shown, Congress has made the reliability of that determination irrelevant to the statutory scheme and Lewis indicates that it could constitutionally do so. Petitioner, moreover, has not been denied review of his deportation order -- he simply refused to invoke such review. Cf. Yakus v. United States, 321 U.S. 414, 444 (1944) ("no principle of law or provision of the Constitution * * * precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity"). Petitioner's due process argument, therefore, is unpersuasive.

Petitioner cites United States v. Heikkinen, 221 F.2d 890 (7th Cir. 1955); United States v. Bowles, 331 F.2d 742 (3d Cir. 1964), and United States v. Gasca-Kraft, 522 F.2d 149 (9th Cir. 1975), to support his argument that the validity of a prior deportation order may be reviewed in a prosecution under 8 U.S.C. 1326. Any possible disparity between these cases and the decision below, however, does not warrant the attention of this Court.

In United States v. Rosal-Aguilar, 672 F.2d 721, 722-723 (1981), the Seventh Circuit retreated from the position taken in Heikkinen and expressly held that a defendant "is not constitutionally entitled to relitigate the merits of the deportation in a subsequent Section 1326 prosecution." _/ Accord, United States v. De La Cruz-Sepulveda, 665 F.2d 1129,

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_/ Heikkinen, moreover, involved a prosecution under the statutory forerunner to 8 U.S.C. 1252(e), and Congress has since provided for limited collateral review in Section 1252(e) cases. 8 U.S.C. 1105a(a)(6). But, as we have noted, Congress has not authorized collateral review of deportation orders in prosecutions under Section 1326.

1131 (5th Cir. 1981); United States v. Pereira, supra; United States v. Gonzalez-Parra, 438 F.2d 694, 697 (5th Cir.), cert. denied, 402 U.S. 1010 (1971); Arriaga-Ramirez v. United States, 325 F.2d 857, 859 (10th Cir. 1963). In United States v. Bowles, supra, 331 F.2d at 750, the court held that an order of deportation may be collaterally attacked in a criminal proceeding on two "limited grounds" -- that "there is no basis in fact for the Board's conclusion in respect to deportability" and that "there is no warrant in law for * * * issuance [of the deportation order]." Because petitioner does not raise either of these grounds as the basis for his collateral attack, Bowles does not aid his cause.

The sole support for petitioner's argument, therefore, is the position taken by the Ninth Circuit in United States v. Gasca-Kraft, supra. But the Ninth Circuit adheres to this position solely on the basis of stare decisis (United States v. Barraza-Leon, 575 F.2d 218, 220 (1978)), and the circuit has not had the opportunity to reconsider the issue in light of this Court's decision in Lewis v. United States, supra. See United States v. Ranzel-Gonzales, 617 F.2d 529, 530 (9th Cir. 1980); United States v. Calderon-Medina, 591 F.2d 529, 530 (9th Cir. 1979). Until the Ninth Circuit has had that opportunity, we do not believe that the possible conflict engendered by its decisions warrants this Court's review. _/

_/ Prior to this Court's decision in Lewis, the Ninth Circuit permitted collateral attack on felony convictions in a prosecution under 18 U.S.C. 1202(a)(1) in much the same manner as it currently permits collateral review of deportation proceedings in a Section 1326 prosecution. See 445 U.S. at 58 n.4. Because of the close similarity of petitioner's claims to the arguments rejected in Lewis, this Court's decision in Lewis might well bring the Ninth Circuit in line with the position taken by the other courts of appeals regarding the scope of a prosecution under 8 U.S.C. 1326.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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